90-1179

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

STATE FARM GENERAL INSURANCE COMPANY,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
STATE FARM LIFE INSURANCE COMPANY, AND
STATE FARM FIRE AND CASUALTY COMPANY,
Petitioners,
v.
MURIEL E. KRASZEWSKI, DAISY O. JACKSON, AND WILDA TIPTON,
ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS
SIMILARLY SITUATED,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

* M. KIRBY C. WILCOX
DEBRA L. PERSCHBACHER
MORRISON & FOERSTER
345 California Street
San Francisco, California 94104-2675
Telephone: (415) 677-7000

Attorneys for Petitioners

* Counsel of Record

QUESTION PRESENTED

At the remedies phase of an employment discrimination class action, do district courts have discretion to provide for the accrual of back pay for individual class members as seems appropriate in light of the facts and circumstances of the case?

LIST OF PARTIES

There are no parties to this action other than those identified in the caption of the within action.

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IN THE

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No. _____

STATE FARM GENERAL INSURANCE COMPANY, et al.,
Petitioners,

v.

MURIEL E. KRASZEWSKI, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, collectively State Farm Insurance Companies ("State Farm" or "Company"),* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on August 31, 1990.

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* State Farm's parent company is State Farm Mutual Automobile Insurance Company. All of State Farm's subsidiaries are wholly owned.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.2d 1182, and is reprinted in the appendix (App. A-1). The memorandum order of the United States District Court for the Northern District of California dated June 8, 1988, is not reported but is reprinted in the appendix (App. A-10).

JURISDICTION

The opinion of the court of appeals was filed on August 31, 1990. State Farm filed timely petitions for rehearing and for rehearing en banc, which were denied on October 23, 1990. (App. A-21.) The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This has become one of the largest and most protracted class action cases in the history of Title VII of the Civil Rights Act of 1964. Class Counsel have estimated potential liability for back pay and front pay for the approximately 1100 class members to be as high as $500 million. The lawsuit began on June 1, 1979. Plaintiffs alleged sex discrimination by State Farm in California with respect to the hire of women into its sales agent position of "Trainee Agent." The district court certified the class on September 9, 1981, and bifurcated the proceedings into a liability phase (Stage I) and a remedy phase (Stage II) on November 6, 1981. Trial started on March 31, 1982, and ended on February 14, 1983. On April 29, 1985, after a long illness, the district judge issued findings which held State Farm liable for sex discrimination in the recruitment, selection, and hire of Trainee Agents within the State of California. *Kraszewski v. State Farm General Ins. Co.*, 38 Fair Empl. Prac. (BNA) Cas. 197 (N.D. Cal. 1985) ("Stage I findings").

On June 21, 1985, State Farm substituted its counsel of record. On December 9, 1985, and April 2, 1986, State Farm and Class

Counsel, respectively, moved the district court for an order regarding the most appropriate procedure for determining and distributing damages at Stage II. State Farm argued for the formula distribution of damages; Class Counsel argued for an individual hearing procedure. The district court ruled for plaintiffs on July 17, 1986 and encouraged the parties to negotiate their remaining differences. *Kraszewski v. State Farm General Ins. Co.*, 41 Fair Empl. Prac. (BNA) Cas. 1088 (N.D. Cal. 1986) ("July 17 order").

As a result of these negotiations, State Farm and Class Counsel agreed to the terms of a Claim Procedure Decree, which is a *hybrid* of the positions espoused by State Farm and by Class Counsel, and which the district court approved and entered on March 15, 1988. The Decree provides for the calculation of individual make-whole damages *solely* by reference to an agreed *formula*, which incorporates every major component of Title VII monetary liability, including back pay, front pay, mitigation, employee attrition, and interest. It also provides for the determination of *entitlement* to such formula make-whole damages *solely* by resort to individual *hearings*.

The Decree did not resolve every dispute that the parties encountered during their settlement negotiations. Notably, the Decree left unresolved the issue underlying this appeal – the date on which the accrual of back pay liability terminates. The parties agreed that back pay must accrue to March 15, 1988, the date that the district court approved the Decree. The parties further agreed that interest must run to the date of each individual judgment. The parties, however, reserved the question whether back pay accrual should cease on March 15, 1988, or on the date of each individual judgment, or on some date in between.

In simultaneous motions before the district court, State Farm contended that back pay accrual should cease on March 15, 1988,[1]

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[1]March 15, 1988 was the cutoff date in the Decree for make-whole relief to the three named plaintiffs. Moreover, March 15, 1988 was

and Class Counsel contended that back pay accrual should cease on the date of each individual judgment. The district court held oral argument and opened the hearing with an admission of difficulty interpreting the proper legal standard for the analysis of the issue. While the court believed that the facts and circumstances of the case supported an early termination of back pay accrual, it viewed its discretion to weigh such facts as severely limited as a matter of law.

> It appears to me that the facts favor State Farm and the law appears to favor plaintiffs . . . . I find myself wondering whether I have the discretion to choose one of these two dates [March 15, 1988, or the date of each individual judgment] or to otherwise compromise this dispute.

On June 8, 1988, the district court issued its order ("June 8 order"), ruling that Title VII did not permit the exercise of the "wide discretion" that the Supreme Court had authorized in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) ("*Albemarle*"). Instead, the district court held that "absent compelling circumstances . . . its equitable discretion [was] confined by case law that virtually compel[led] full accrual." (App. A-11.) The district court thus ruled that back pay must accrue to the date of each individual judgment, offset by one year to accommodate the illness of the district judge.[2]

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14 years after the beginning of the liability period, 9 years after the filing of the complaint, and 5 years after the end of trial. *Throughout this entire period, back pay has continued to accrue.* State Farm raises in this appeal only the issue whether back pay must continue to accrue *subsequent* to this period, or whether only *interest* continues to accrue to the date of each individual judgment.

[2]The district court awarded this offset after noting that "following change of counsel, State Farm has 'done equity.' State Farm has committed itself to both compensating harmed individuals and altering its discriminatory conduct." (App. A-18.)

State Farm believed that the district court had all but relinquished its equitable discretion through the formulation and application of an erroneous rule of law. The Company, therefore, appealed the June 8 order to the Ninth Circuit. On August 31, 1990, the Ninth Circuit, in an opinion by Judge Stephen Reinhardt, affirmed the district court's decision to award back pay accrual to the date of each individual judgment, and reversed and remanded that part of the district court's order that deducted one year's back pay for the delay caused by the district judge's illness. The Ninth Circuit denied State Farm's Petition for Rehearing and Suggestion for Rehearing En Banc on October 23, 1990.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has created a new rule of compelled back pay accrual-to-judgment for Title VII cases which squarely violates the directive of this Court in *Albemarle* that courts exercise "wide discretion" to fashion the most appropriate monetary relief. The Ninth Circuit's new rule also creates a direct conflict with a Title VII decision from the Seventh Circuit terminating back pay accrual on the date of *class* judgment in an individual hearing procedure. The Ninth Circuit's new rule further conflicts with the holdings of the nine federal circuits that have considered the adequacy of formula relief – and unanimously concluded that back pay accrual may terminate on the date of *class* judgment consistent with the make-whole principles of Title VII. Finally, the Ninth Circuit's new rule conflicts with the established principle that *interest* may compensate for delay, and thus the decision *encourages* protracted litigation. These circumstances demonstrate the exceptional importance of this case and the need for this Court to exercise its authority to review the judgment below.

I. The Ninth Circuit's Imposition of a Rigid Rule Disregards this Court's Instruction to Exercise Wide Discretion in Fashioning Make-Whole Relief and Conflicts with Circuit Law Regarding Make-Whole Relief in Title VII Class Actions.

In a Title VII action, once liability has been established, section 706(g) empowers courts finding illegal discrimination to "order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, *with or without* back pay . . . or any other equitable relief *as the court deems appropriate*." 42 U.S.C. § 2000e-5(g) (1982) (emphasis added). This section was intended to provide courts with broad discretion in awarding relief in Title VII actions. Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, Conference Report, 118 Cong. Rec. 7166, 7168 (1972) ("The provisions of this subsection are intended to give the courts *wide discretion* in exercising their equitable powers to fashion the most complete relief possible") (emphasis added).

Citing this section, this Court in *Albemarle* held

> given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.

422 U.S. at 421-22. Thus, while establishing what subsequent decisions have called a "preference" in favor of *some* back pay upon

proof of discriminatory wage loss, *Albemarle* makes it clear that the precise remedy for any given case is left to the "wide discretion" of the district courts which "is equitable in nature." *Id.* at 416, 421.

In cases involving *individual plaintiffs*, the circuit courts have adopted a general rule that when discriminatory wage loss is proven, back pay awards shall accrue to the date of judgment. *See, e.g., Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986); *Nord v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985). This general rule often is the most appropriate means of achieving make-whole relief in such individual cases, because on the date that the court enters judgment in the plaintiff's favor, there is a *single* order addressing *both* liability and a remedy, and as of this date, back pay accrual terminates. Any delay between the date of the court's judgment and the plaintiff's actual receipt of her damage award is compensated by the payment of interest.

However, *class actions* implicate very different considerations from individual lawsuits, due in part to the sheer numbers involved. Consistent with *Albemarle's* grant of "wide discretion," and consistent with *Albemarle's* admonition to fashion "the most complete relief possible," the circuit courts have upheld a variety of mechanisms for distributing make-whole relief. Thus, despite a "preference" for individual hearings where feasible, the circuits have uniformly held that in class actions, victims of discrimination may be made whole through the use of *either* individualized awards *or* classwide, formula distribution of monetary relief, and that *either* procedure satisfies "the most complete relief possible" standard. *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1289-90 (D.C. Cir. 1984) ("*Teamsters* . . . should not be read as an unyielding limit on a court's equitable powers to fashion effective relief for proven discrimination . . . later courts have often faced situations in which the *Teamsters* hearing preference had to bend to accommodate Title VII's remedial purposes"), *cert. denied*, 471 U.S. 1115 (1985); *see also Hartman v. Wick*, 678 F. Supp. 312, 333-34 (D.D.C. 1988) ("because the Court is aware of the enormous disruption these hearings can cause counsel

and the Court or its designee, as well as the enormous dedication of resources the hearings require, the Court believes that the interests of justice would best be served if individualized hearings could be avoided"); *Love v. Pullman Co.*, 13 Fair Empl. Prac. (BNA) Cas. 423, 428-29 (D. Colo. 1976) ("compensating the plaintiffs in this case by means of a classwide formula is not only permissible, it is the only workable method when confronted with a total class of about 1500 employees"), *aff'd*, 569 F.2d 1074 (10th Cir. 1978). *Every* circuit that has ever compared classwide, formula distribution of monetary relief with individualized awards has held that *both* satisfy the concept of make-whole relief.[3]

Furthermore, consistent with *Albemarle's* grant of "wide discretion," courts have terminated back pay accrual in class actions on various dates, depending on the facts of each case. Unlike the cases involving individual plaintiffs, in which back pay awards generally accrue to the date of judgment, in *every* class action formula case published, *back pay accrual ceases when the fund is approved*, without regard to the time it takes to distribute those funds. Moreover, in a class action involving *individual hearings*, the Seventh Circuit upheld the termination of back pay accrual as of the date of the district court's back pay order – a decision the Ninth Circuit simply ignored. *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

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[3]*See, e.g., Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984), *modified on other grounds*, 742 F.2d 520 (9th Cir. 1984); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807 (2d Cir. 1983), *cert. denied sub nom. International Brotherhood of Electrical Workers v. Ingram*, 464 U.S. 937 (1983); *Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980); *Love v. Pullman Co.*, 569 F.2d 1074 (10th Cir. 1978); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1977); *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979).

Most importantly, while virtually all cases – whether individual actions or class actions and whether involving individualized hearings or formula relief – involve some passage of time between the *end of accrual* and the *actual payment* of damages (for example, when the distribution of class damages takes several months to complete or when an individual judgment is appealed), the federal courts typically compensate for such delays by requiring accrual of *interest*, not continued accrual of damages. As this Court has stated,

> Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money.

Library of Congress v. Shaw, 478 U.S. 310, 322 (1986).

Contrary to this Court's mandates, the Ninth Circuit has ruled that the lower courts are *not* empowered with "wide discretion" and, moreover, that *both* the continued accrual of back pay *and* interest are necessary to compensate for the delay factor. The implications of the Ninth Circuit's holding are staggering. First, it runs directly counter to *Albemarle*. Second, it is clearly inconsistent with the individual hearing procedure decision of the Seventh Circuit in *Stewart*. Third, it effectively holds that the entire line of formula relief cases has been incorrectly decided by terminating back pay accrual on the date of class judgment, rather than on the dates of individual payment. In short, the Ninth Circuit has now held that, whether damages are distributed at Stage II by resort to an individual hearing procedure or formula distribution procedure or a hybrid, back pay accrual to *class* judgment constitutes *not* make-whole relief, but *reversible error*.

II. The Consequences of the Ninth Circuit's Rule Are to Encourage Protracted Litigation and to Waste Judicial Resources.

In the present case, claimants *could have* received their damage awards on the date of the court's approval of the Consent Decree but for the court's order to conduct entitlement hearings, because the *amount* of each claimant's relief is determined through an agreed-upon formula. To *mandate* continued back pay accrual under these circumstances is particularly unjust, because it creates a powerful incentive for Class Counsel to draw out Stage II proceedings as long as possible so that each claimant's "pot" will continue to grow. In the words of Judge Hug, who sat on the Ninth Circuit panel hearing oral argument for this appeal, "How do I get to be the claim that is heard last?"

The result of the Ninth Circuit's holding is that each claimant has an incentive to increase her total award at a tremendous waste of judicial resources. The continued accrual of back pay also creates a disincentive for Class Counsel to agree to settlement of individual claims on the basis of compromised calculations, because "holding out" for the hearings produces much greater damages simply by the passage of time.[4] This runs completely counter to Title VII's purpose of settling such matters expeditiously. Moreover, a rule of compelled accrual is a strong disincentive against an employer agreeing to individualized hearings – despite this Court's articulated preference for such hearings – due to the massive financial impact of continuing

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[4]Claims are aggregated by calendar year within the liability period that runs from 1974 through 1987. Consider the impact upon a 1984 claim of the "wait" for a hearing date. Depending upon whether that claim is scheduled for hearing in 1991, 1993, or 1997, the damages awarded to a successful claimant would increase from $229,699 in 1991, to $412,017 in 1993, and to $1,052,794 in 1997.

back pay accrual for large numbers of individuals over a period of years.[5]

CONCLUSION

The question presented here is of clear and pressing importance. Settlement of Title VII class actions should be encouraged, and victims of discrimination should be made whole. But the Ninth Circuit has created confusion as to what constitutes make-whole relief and, in the process, has created a rule that actively discourages settlement by rewarding extensive litigation and delay. These results demonstrate the need for review by this Court.

Respectfully submitted,

* M. KIRBY C. WILCOX
DEBRA L. PERSCHBACHER
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
(415) 677-7000

Attorneys for Petitioners

* Counsel of Record

January 1991

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[5]At the time this Petition was filed, nearly three years after the district court approved the Consent Decree, and 17 years after the beginning of the liability period, 55 claims have been resolved. Approximately 1,050 claims remain. The claim procedure is not expected to conclude before 1999.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 88-15337, 88-15399

Muriel E. KRASZEWSKI; Daisy O. Jackson;
Wilda Tipton, on behalf of themselves
and all other persons similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

STATE FARM GENERAL INSURANCE COMPANY;
State Farm Mutual Automobile Insurance Company;
State Farm Fire and Casualty Company,

Defendants-Appellants/Cross-Appellees.

Argued and Submitted Oct. 4, 1989

Decided Aug. 31, 1990

Guy T. Saperstein, Mari Mayeda, Farnsworth, Saperstein & Seligman, Oakland, Cal., for plaintiffs-appellees/cross-appellants, Muriel E. Kraszewski, et al.

Raymond L. Wheeler, Kirby Wilcox, Erica B. Grubb, Debra L. Hamilton, Morrison & Foerster, San Francisco, Cal. for defendants-appellants/cross-appellees, State Farm Ins. Companies.

Charles A. Shanor, Gen. Counsel, Gwendolyn Young Reams, Associate Gen. Counsel, Vincent Blackwood, Asst. Gen. Counsel, Donna J. Brusoski, E.E.O.C., Washington, D.C., for E.E.O.C. as amicus curiae.

Appeal from the United States District Court for the Northern District of California.

Before HUG, FARRIS and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Plaintiffs brought a class action in United States District Court for the Northern District of California, alleging that defendant State Farm General Insurance Company ("State Farm") engaged in statewide discrimination with respect to the recruitment, hiring and training of women for sales agent positions, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Following trial, the district court ruled that State Farm was liable for classwide sexual discrimination. The court found that women who attempted to become Trainee Agents were "lied to, misinformed, and discouraged in their efforts to obtain the entry level sales position." *Kraszewski v. State Farm General Ins. Co.*, 38 Fair Empl. Prac. Cas. (BNA) 197, 257, 1985 WL 1616 (N.D. Cal. 1985). These findings as to general

liability were issued more than two years after the trial, a delay due in substantial part to the judge's prolonged illness. The court also ordered the use of individual "*Teamster*" hearings to determine individual liability and damages.[1] *Kraszewski v. State Farm General Ins. Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1088, 1089, 1986 WL 11746 (N.D. Cal. 1986).

After the court's order requiring individual hearings, the parties settled nearly every damage question. They agreed, however, that each plaintiff would be required to establish her entitlement to relief in a separate, non-judicial proceeding before one of seven special masters. The parties also left open the proper termination date for back pay liability: they asked the district court to determine whether State Farm's back pay liability should terminate on the date the court approved the consent decree or on the date each individual plaintiff ultimately receives a judgment in her favor. This appeal involves only the issue of the proper termination date for back pay liability.

Following an oral hearing, the district judge held for the plaintiffs, concluding that back pay liability should continue to accrue until the date of individual judgment or settlement. He did so in an extremely thorough, thoughtful and well-reasoned opinion, after weighing all the interests involved and balancing them carefully. The court also decided to subtract one year's back pay from each individual's potential judgment, although neither party had suggested such a compromise. The reason for the deduction was that the judge did not want State Farm to bear the increased liability attributable to the delay caused by his illness.

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[1] In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361, 97 S. Ct. 1843, 1867-68, 52 L.Ed.2d 396 (1977), the Supreme Court held that individual hearings are the preferred method of determining damages in Title VII cases. Since *Teamsters* such hearings have become routine.

State Farm appeals from the part of the court's order providing that back pay will accrue on a case-by-case basis until each individual receives a judgment or settlement. Plaintiffs cross-appeal from the part of the order shortening the individual accrual periods by one year. We uphold the district court's determination that back pay continues to accrue until the date of individual judgment, but conclude that the court erred in subtracting one year's damages from each individual's potential back pay award. We therefore affirm in part, reverse in part, and remand.

In choosing the date of individual judgment as the proper termination date for back pay liability, the district judge did not abuse his discretion. *See E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (district court's calculation of a back pay award is reviewed only for an abuse of discretion). In fact, he applied the rule courts must generally follow in Title VII cases. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), the seminal case in the field, the Supreme Court explained that the principal objectives of Title VII are to eliminate the vestiges of employment discrimination and to make persons whole for injuries suffered due to such discrimination. The Court directed that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Id.* at 419-20, 95 S. Ct. at 2372-73 (quoting *Wicker v. Hoppock*, 6 Wall. 94, 99, 73 U.S. 94, 18 L.Ed. 752 (1867)). Moreover, according to the Court:

> Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but, rather *to make possible the 'fashion[ing] [of] the most complete relief possible.'*

Id. 422 U.S. at 421, 95 S. Ct. at 2373 (emphasis added).

Since *Albemarle*, the Supreme Court and lower courts have, as a matter of course, awarded back pay relief to plaintiffs, and, also as a matter of course, have granted that back pay until the date of judgment. Such relief has uniformly been viewed as necessary to put the victim in the place he would have been – to make him whole. Thus in *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986), we held, "absent compelling circumstances, when an employer has refused to hire an employee in violation of the employee's rights under Title VII, *the court should compute the back pay award from the date of the discriminatory act until the date of the final judgment.*" (emphasis added). In *E.E.O.C. v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 590 (2nd Cir. 1976), *cert. denied sub nom. Rios v. Enterprise Ass'n Steamfitters, Local No. 638*, 430 U.S. 911, 97 S. Ct. 1186, 51 L.Ed.2d 588 (1977), the Second Circuit reversed the district court's termination of its back pay award on the date it ordered injunctive relief, since that date was inconsistent with the "make whole" purpose of back pay. The court stated,

> [o]bviously, the injunctive relief did not provide for immediate entry into the A Branch for all identifiable victims of past discrimination (much less immediate job placement of those who had been denied equal job referrals). It is the date of actual remedying of discrimination, rather than the date of the district court's order, which should govern.

Id. The Sixth Circuit reversed a district court order that terminated back pay when the employer ceased its general policy of discrimination. The court explained that "[g]enerally, where an employer has discriminatorily refused to hire an employee, contrary to that employee's rights under Title VII, an award of back pay will be computed from the date of first refusal until final judgment." *E.E.O.C. v. Monarch Machine Tool Co.*, 737 F.2d 1444, 1453 (6th Cir. 1980). The Eleventh Circuit, in *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985), similarly concluded that the district court erred by ending back pay on the date

of the court's oral findings, four months before judgment was entered. Terminating back pay prior to judgment was considered to be "contrary to the 'make whole' purposes of Title VII." *Id. Accord, Gonzalez v. Markle Manufacturing Co.*, 487 F. Supp. 1088, 1092 (W.D. Tex.) (plaintiff entitled to back pay until date of judgment not date of magistrate's report), *aff'd*, 614 F.2d 1083 (5th Cir. 1980); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.) (back pay extends until the date of judgment), *cert. denied*, 429 U.S. 920, 97 S. Ct. 315, 50 L.Ed.2d 286 (1976); *Hartman v. Wick*, 678 F. Supp. 312, 336 (D.D.C. 1988) ("In keeping with the remedial, make-whole purpose of back pay, the cut-off date of each back pay award will be the day on which the award is approved for the particular claimant."). The district court's approval of the consent decree provides no more relief for an individual claimant (other than the name parties) than did the order granting injunctive relief in *Enterprise*, the court's oral findings in *Nord*, or the employer's cessation of its discriminatory policy in *Monarch*. In the case before us no individual claimant will have a right to *any* relief until she obtains an individual judgment of liability in the non-judicial proceedings. The date of that judgment is the date on which State Farm's discriminatory practices will be remedied as to the individual plaintiff. Thus, unless there is a compelling reason for deviating from the general rule here, the district court's order must be affirmed.

We recognize that, as State Farm emphasizes, this is a case in which a formula has been adopted for resolving most damage issues, and we acknowledge that a logical argument can be made for a uniform termination date in such cases. However, we are not persuaded by that fact that the district court erred when it concluded that no compelling reason existed for departing from the general rule that back pay should continue to accrue until the date of judgment.[2]

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[2] State Farm divides the Title VII cases involving class actions into "pure formula relief" cases and "individualized hearing" cases, and argues that in both courts have terminated back pay before final judgment. State Farm characterizes the instant suit as a "hybrid," since the parties' consent decree provides for formula-based payments to be made to class members whose

We also recognize that, as State Farm argues, awarding back pay until the date of individual judgment will result in some inter-claimant inequity. However, this is no different than in the ordinary back pay case. Any time an employer has discriminated against more than one employee there is the possibility that one claimant may settle early while another may go to trial, or that different claimants may have different trial dates. Thus, under the well-established make-whole rule, there is always the possibility that one claimant will receive more back pay than another simply by virtue of the timing of the ultimate settlements or judgments.

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entitlement is determined through individualized hearings. We do not find the pure formula cases such as *Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union 396*, 637 F.2d 506 (8th Cir. 1980), to be apposite. There may well be reasons not to continue back pay accrual until judgment when the monetary effects of discrimination are determined on a classwide basis and then divided *pro rata* among the class members. State Farm cites only two "individualized hearing" cases in support of its proposition. State Farm first notes that in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 289 (2nd Cir. 1981), *cert. denied*, 455 U.S. 988, 102 S. Ct. 1611, 71 L.Ed.2d 847 (1982), the court terminated back pay before final judgment either on the date that a claimant was actually hired or on the date that a claimant "ceased or failed to meet any of the City's requirements . . . or ceased to have interest, whichever is earlier." We find this holding perfectly consistent with the general rule in Title VII cases of awarding back pay until the harm is fully remedied. A claimant ceases to suffer damages when the employer offers him the job he sought or when he becomes unqualified to hold the position or is no longer willing to accept it. The second case State Farm cites is *Stewart v. General Motors Corp.*, 542 F.2d 445, 454 (7th Cir. 1976), *cert. denied*, 433 U.S. 919, 97 S. Ct. 2995, 53 L.Ed.2d 1105 (1977), in which the court, without explanation, provided for the termination of back pay on the date the district court entered its decree. The opinion does not reveal whether or not this was the termination date the plaintiffs requested or even whether plaintiff agreed or disagreed with the date ordered by the court. In any event, we agree with the district court below that *Stewart*, which was decided before *Teamsters* and most of the other relevant cases, is not in line with present authority.

Title VII grants a district court broad discretion to formulate a remedy for victims of unlawful discrimination. To the extent the district court's power is limited, it is because the court has an obligation to fashion the most complete relief possible. *See Albemarle*, 422 U.S. at 418, 95 S. Ct. at 2372 ("the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"). State Farm argues that in this case the district judge failed to exercise his discretion. It claims that the judge concluded that he was required to rule for plaintiffs. State Farm simply misreads the district judge's opinion. The district court carefully considered a number of reasons proffered by State Farm for departing from the general rule of awarding back pay until judgment and, after weighing all the facts and circumstances, found those reasons not to be compelling. *See Thorne*, 802 F.2d at 1136 (requiring a compelling reason to justify not awarding back pay until the date of final judgment). When a judge ultimately concludes that the law dictates a particular result, that does not mean that in the process of doing so he has not exercised his discretion. However, once that discretion has been exercised, and the judge has reached certain determinations, the law may indeed tell him what the final resolution must be. Here, having determined in his discretion – which must be guided by prior Title VII rulings – that State Farm's reasons were not compelling, the district court properly applied the general rule.

The court did err, however, in deducting one year's back pay for each claimant to account for the delay caused by the judge's illness. The Supreme Court has held that the costs of delay not attributable to either the employer or the employee are to be borne by a wrongdoing employer rather than a wronged employee. *See N.L.R.B. v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 264-66, 90 S. Ct. 417, 420-22, 24 L.Ed.2d 405 (1969). While *Rutter-Rex* involved the National Labor Relations Act ("NLRA"), as amended, 61 Stat. 136, 147, 29 U.S.C. § 141 *et seq.*, we find the rules to be equally applicable in Title VII cases. The remedial provisions of Title VII

were modeled on the NLRA, *see Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 226 n.8, 102 S. Ct. 3057, 3062-63 n.8, 73 L.Ed.2d 721 (1982); *Albemarle*, 422 U.S. at 419, 95 S. Ct. at 2372-73, and the purposes behind the back pay provisions of each statute – to make employees whole and to deter future employer misconduct – are similar. We note that the Supreme Court has cited *Rutter-Rex* with approval in at least one Title VII case, *see Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769, 96 S. Ct. 1251, 1266, 47 L.Ed.2d 444 (1976), although on a different if related point, and that the Tenth Circuit has concluded, as we do here, that the rule of *Rutter-Rex* applies in Title VII actions. *See United States v. Lee Way Motor Freight Inc.*, 625 F.2d 918, 932-33 (10th Cir. 1979). In reducing each individual's back pay award by one year to avoid "penalizing" State Farm for the court's delay, the district court impermissibly shifted the burden of the delay to the wronged employees. Accordingly, we reverse that portion of the court's order.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 79-1261 TEH

MURIEL E. KRASZEWSKI, et al.,

Plaintiffs,

v.

STATE FARM GENERAL INSURANCE COMPANY, et al.,

Defendants.

ORDER RE BACKPAY ACCRUAL *

This matter comes before the Court on cross-motions regarding back pay accrual. After careful consideration of the parties' papers and oral arguments, the Court finds that successful claimants are entitled to back pay accrual until the date of judgment or settlement, with an important one year's pay deduction described at the end of this Opinion.

Background.

On July 17, 1986, this Court issued its Stage II Remedies Order. *Kraszewski v. State Farm Insurance Company*, 41 FEP Cases 1088, 1089 (N.D. Cal. 1987). In that Order, we held that "plaintiffs are entitled to individualized hearings in order to ensure 'make whole' relief." *Id.* at 1093.

Following that Order, the parties negotiated an admirably comprehensive consent decree to govern, *inter alia*, these individualized hearings. The parties have appointed seven special masters to adjudicate these hearings, delineated the applicable burdens of proof, and established formulas for the calculation of damages. Accordingly, the sole issue for the special masters to determine is whether each claimant is entitled to the prescribed damage formula.

The parties have left one major issue unresolved: at what date shall liability for back pay terminate? State Farm argues that back pay accrual should terminate on March 15, 1988 ("early accrual"), the date the Court approved the consent decree. Plaintiffs contend that back pay should accrue until the date that each claimant receives a judgment in her favor, or State Farm settles her claim ("full accrual").

We have discerned four areas of dispute that shape the parties' respective views on the appropriate remedy. These areas are 1) the extent to which our equitable power is confined by existing case law; 2) the extent to which either accrual date would foster inter-claimant equality; 3) the extent to which full accrual would convert the individualized hearing process into an unfair penalty for State Farm; and 4) the extent to which full accrual would subvert the hearing process. We consider each in turn.

1. Case Law Governing the Court's Equitable Powers.

State Farm and plaintiffs advance opposing views of the nature of the Court's remedial authority. State Farm contends that the Court's authority is wholly equitable; we should therefore balance the interests of the claimants, the court, and State Farm, and choose a date which adequately compensates the successful claimant but avoids imposing an unfair penalty upon State Farm. Plaintiffs agree that the Court's power is equitable, but argue vigorously that our equitable discretion is confined by case law that virtually compels full accrual.

In the interest of expediting a decision on this matter, we dispense with a lengthy discourse on Title VII remedial law. Instead, we note that case law overwhelmingly supports plaintiffs' position; back pay accrual to the date of judgment is the standard Title VII monetary remedy. For example, in *E.E.O.C. v. Enterprise Ass'n Steamfitters*, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), the court reversed the district court for terminating accrual at the date of the decree. The court held that "since the purpose of back pay is to make whole the victims of discrimination . . . the date of actual remedying of discrimination" should govern. Similarly, in *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986), the court stated that "[a]bsent compelling circumstances, when an employer has [violated Title VII], the court should compute the back pay award from the date of the discriminatory act until the date of final judgment."

This principle has been routinely applied in cases in which the parties conduct individualized *Teamsters* hearings during Stage II. For example, in *Hartman v. Wick*, 678 F. Supp. 312 (D.D.C. 1988), class action plaintiffs sued the United States Information Agency for gender discrimination. The Court found that the USIA had violated Title VII and ordered individualized *Teamsters* hearings to determine which class members would be compensated. *Id.* at 325. Like this case, the court anticipated that a large number of hearings would be conducted. *Id.* at 335. Though the court did not extensively discuss the appropriate back pay accrual date, the court stated "[i]n keeping with the remedial, make-whole purpose of back pay, the cut-off date of each back pay award will be the day on which the award is approved for the particular claimant." *Id.* at 336.

Similarly, in *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 931 (10th Cir. 1979), the district court found class-wide racial discrimination, and appointed a special master to ascertain damages for each claimant. *Id.* at 925. The special master set an accrual termination date of April 1974, the date the court entered a preliminary injunction. The district court "reversed" the special master

on the accrual date, and ordered accrual until September 1977, the date the court resolved all issues for individual claimants. The Tenth Circuit affirmed the use of that date, holding that adoption of the special master's date would "fall far short of achieving equitable relief and rendering the employee whole." *Id.* at 933.

Given these and numerous other precedents, we cannot agree with State Farm that these cases merely establish a broad set of abstract principles that compel no particular result.[1] Instead, we find that the clear thrust of Title VII remedial law is to award back pay until the date of final judgment. Thus, we place the burden on State Farm to advance compelling reasons why we should depart from this well-established rule. To those reasons we now turn.

2. Inter-claimant Equality.

State Farm argues that if we order full accrual, we will grant a windfall to winning claimants. State Farm first observes that the three named plaintiffs all received cash awards on March 15, 1988, the date the Court approved the decree. They next note that Class Counsel agrees that the amounts they received made them whole. Therefore, claimants who receive amounts greater than the March 15 sum plus interest would necessarily receive more than make whole relief. Since back pay accrual beyond March 15 would ensure that successful claimants receive more than the sum accrued as of March 15, full accrual bestows a windfall upon successful claimants.

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[1] State Farm cites only one case for the proposition that courts choose dates prior to judgment in Stage II cases. In *Stewart v. General Motors Corp.*, 542 F.2d 445, 454 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977), the Seventh Circuit did terminate accrual on the date of the decree. However, numerous cases have been decided after this case that conflict with that holding. We therefore find that the back pay portion of *Stewart* is not in line with present authority.

In response, plaintiffs argue that winning claimants should receive an award based on the same *theory* of entitlement dates that has been applied to the named plaintiffs. That is, the three named plaintiffs accrued back pay until March 15 because on that date, final judgment was entered in their favor. Plaintiffs argue that the same theory of entitlement should apply to the winning claimants: they too should accrue back pay until a final judgment is rendered in their favor.

This dispute is subtle, interesting, and not easy to resolve. However, on balance we agree with plaintiffs. We believe that State Farm has erred by assigning too much significance to the March 15 date. It is not a magical or metaphysical date that marks the time at which all class members would be made whole by State Farm. Indeed, State Farm proposes several other dates that the court may consider. Instead, it is merely the date at which final judgment was rendered for three class members.

On the other hand, there is some "magic" in choosing the date of judgment. The reason for choosing that date is that victims of discrimination are not made whole until the effects of discrimination are terminated, either through a job offer, a payment of cash, or both. The fact that some class members will receive more cash than others flows ineluctably from this principle, especially since the decree contemplates a succession of individualized hearings leading to different dates of final judgment.

We do not believe that the mere presence of inter-claimant inequality compels early termination of back pay. A hypothetical may help illustrate our reasoning:

Assume that two plaintiffs, refused jobs at the same company, file a discrimination suit. Prior to trial, the parties stipulate to damages; they agree upon the net income that both plaintiffs would have earned as employees for defendant. Thus, the sole issue for trial is whether these two plaintiffs were rejected for discriminatory reasons. Long before trial, the employer settles with Plaintiff One and offers her a

job plus back pay accruing to the date of settlement. The employer litigates the other plaintiff's case, and loses, one year after the settlement with the other plaintiff. Could the employer then successfully argue that the second plaintiff's back pay accrual should be terminated on the settlement date for Plaintiff One? We believe that argument must fail; a Court would not attempt to equalize the cash recovery between the two plaintiffs, but would instead require the employer to provide back pay up to the date of that judgment.

The hypothetical differs from this case only in the volume of the litigation. The volume of this litigation, however, is no reason to depart from a well-established legal rule. Accordingly, we reject this argument for early accrual.

3. Penalty Argument.

State Farm advances a corollary to the windfall argument. They contend that if back pay accrues to the date of judgment, we will have "converted a process into a penalty." State Farm observes that we could have ordered either class-wide formula relief or individualized hearings to remedy the discrimination. The hearing approach is likely to take longer to complete than a formulaic approach. Thus, if we allow full accrual, State Farm's liability may be far greater under the individualized hearings approach than under the formula process. If so, we will have turned a choice between two acceptable alternatives into a basis for far greater liability for State Farm.

We once again disagree with State Farm. Our first reaction to the penalty argument is that it proves too much. That is, *Teamsters* hearings will almost always require a longer and more costly procedure than formula relief. If it were to become a rule of law that the burden of paying for *Teamsters* hearings be borne by class members (in the form of early termination of back pay accrual), plaintiffs will be discouraged from utilizing individual hearings. Imposing this Hobson's choice on Title VII plaintiffs directly conflicts with the Supreme Court's instruction that individualized

hearings are the preferred method of resolving Stage II disputes. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-72 (1977).

In addition, in our Stage II order, we did not make a choice between two mutually acceptable alternatives. Instead, we noted that *Teamsters* hearings are the preferred method, and found that this case fell squarely in the line of cases requiring individualized hearings, since it involved hirings, and not promotions, and since the plaintiffs had agreed to adopt an earnings formula as an alternative to complex individual damage calculations. 41 FEP Cases at 1089-90.

Moreover, we were aware when we made this decision that individualized hearings would prove a more costly process than formula relief. Indeed, we noted State Farm's concerns that individual hearings would "entangle this court . . . into the 21st century" and "produce a process spanning 7000 consecutive days – more than nineteen years." *Id.* at 1089. While we rejected that forecast, we did recognize that individual adjudications for over 1000 positions would be time-consuming and costly. We nevertheless ruled in favor of individual hearings, finding that the need to have each claim adjudicated on its merits outweighed the additional cost.

That finding supports our desire not to carve out an exception in this case. Case law precedents establish both that back pay should accrue until the date of judgment *and* that individualized hearings are the preferred Stage II remedy. Given these twin legal rules, we do not wish to place them in conflict with one another merely because these proceedings, involving many thousands of claimants, will be time-consuming and expensive. Therefore, we reject the penalty argument as a basis for early termination of back pay accrual.

4. Settlement Leverage.

Both sides also dispute the extent to which full back pay accrual will undermine the hearing process. State Farm contends that

allowing full accrual will enable claimants to refuse reasonable settlement offers and wait for continued accrual to "build settlement pressure unrelated to the merits of the dispute." State Farm's Memorandum at 21. Thus, they argue that allowing full accrual will give claimants such great settlement leverage that State Farm would be forced to settle all but the weakest claims. Accordingly, full accrual will subvert the individual hearing process.

We initially note some skepticism about this argument. The consent decree that the parties have negotiated is lengthy, detailed, and complex. The parties have anticipated numerous areas of dispute, and have negotiated them into resolution. Formulas for damages, mitigated earnings, interest, and front pay have been established in excruciating detail. Given the foresight and diligence that each side has displayed in negotiating this decree, how likely is it that State Farm left unresolved an issue which, if we decide adversely to it, will subvert a large portion of the decree? By leaving this issue unresolved and submitting it to this Court, State Farm must have apprehended the possibility that we would opt for full back pay accrual, especially given the large number of Title VII cases that support full accrual. Therefore, we must view State Farm's projections of coerced settlements with some suspicion.

Secondly, we agree with plaintiffs that State Farm's position in this litigation is similar to the position of any employer who litigates a strong Title VII claim. Title VII cases are often long and complex, and employers always take the chance that if they do not promptly settle a claim, they will face a large judgment against them.[2] It is true that in this case, State Farm no longer may make use of a procedure to expedite the processing of the claims; the first hearing will not occur until December 1989. However, in most Title VII cases in which a

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[2] Congress carefully minimized the risk to the employer by limiting damage awards to backpay and excluding punitive damage awards for violations of Title VII. 42 U.S.C. §2000-e5(g).

plaintiff survives pre-trial motions, there will be a considerable delay until the case goes to trial. The vast majority of these cases settle before trial, because it is not economical for the employer to pay the costs of conducting the trial and risking a large monetary judgment, and because plaintiffs usually prefer the certainty of a cash settlement to the risk of a trial.

We can discern no reason why these same factors should not operate here. Whatever our ruling, State Farm will settle the strongest claims and litigate the weakest. Our ruling will probably influence the claims that lie within these extremes, but it will not confer on the claimants any "advantage" that Title VII plaintiffs do not ordinarily enjoy. Therefore, we reject this argument for early termination, and hold that back pay shall accrue to the date of judgment or settlement. That holding, however, is subject to the following modification.

5. One Year Deduction.

Despite our rejection of State Farm's arguments, we do believe that following change of counsel, State Farm has "done equity." State Farm has committed itself to both compensating harmed individuals and altering its discriminatory conduct. We are also aware that these proceedings have taken an unduly long period of time. For example, two years elapsed between the end of trial and the issuance of the Court's Findings of Fact and Conclusions of Law. While some of that delay may be attributed to the complexity of the case and the press of other court business, there are other factors not within either parties' control that caused the delay. Final briefs were submitted on May 9, 1983. Due to a major illness, the Court was unable to work on this case or any other case from late June, 1983 to September 1983, at which time the Court worked on a one-quarter time basis. It was only after many months that the Court could catch up on its caseload and return its attention to this case. Totalling that time up, we find that resolution of that portion of the case was delayed for approximately one year. Thus, we find that each claimant's case should be resolved approximately one year before it will be resolved.

Accordingly, we hereby order that damage awards for successful claimants be calculated *as if* they were decided one year before they were actually decided. For example, if a claimant receives a final judgment in her favor on May 1, 1990, her damages should be calculated as if she received a final judgment on May 1, 1989. However, in no case shall any damage award be less than the sum that would accrue on March 15, 1988 plus interest on that amount as proposed by State Farm.[3]

The Court knows that the burden of delay is not ordinarily placed on the victim of discrimination. *N.L.R.B. v. Rutter-Rex Manufacturing Company*, 396 U.S. 258, 263-65 (1969); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 933 (10th Cir. 1979). However, given the history of this case, we do find that State Farm is entitled to some equitable relief from full accrual. We have therefore struck a balance by granting accrual until the date of judgment, but deducting a year's worth of liability for which State Farm should not be held responsible.

This shall be the Order of the Court. However, we note that neither side proposed this or any other compromise. This one year deduction may pose difficulties that we cannot anticipate, since we are not experts on the *Kraszewski* consent decree. Therefore, the Court

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[3] Given the fact that no hearings shall begin until December 1989, it is unlikely that any damage award would be less than the amount State Farm has proposed – accrual up to March 15 plus interest. However, if such an award under our formula is less than that latter sum, the special master shall choose the March 15-plus-interest figure.

gives each side fifteen days to object to this Opinion on the ground that the one year deduction is incompatible with the decree.

IT IS SO ORDERED.

Dated: June 8, 1988

/s/ Thelton E. Henderson
THELTON E. HENDERSON
United States District Judge

* This Opinion is not intended for publication.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15337, 88-15399

D.C. No. CV 79-1261 TEH

MURIEL E. KRASZEWSKI; DAISY O. JACKSON;
WILDA TIPTON, on behalf of themselves
and all other persons similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

STATE FARM GENERAL INSURANCE COMPANY;
STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY;
STATE FARM FIRE AND CASUALTY COMPANY,

Defendants-Appellants/Cross-Appellees.

ORDER

Filed October 23, 1990

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Before: Hug, Farris, and Reinhardt, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.